

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1059

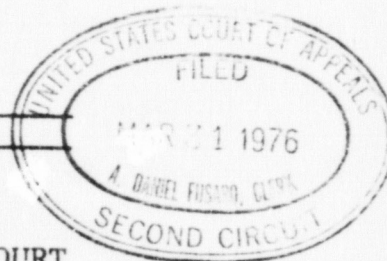
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- -x
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
PAUL VIRUET, :
Appellant. :
----- -x

APPENDIX FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

A. ISADORE EIBEL
Attorney for Appellant
170 Broadway
New York, New York 10038
(212) 227-6798



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Appellee, :
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I N D E X

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Demand for Notice of Intention to		
Offer Alibi Defense		E

JUDGE OWEN

74 CR 1003

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
VS.	John W. Timbers, AUSA.
1. LEON ROGERS-1&2	791-1984
2. SAMUEL EASON, a/k/a 'Buster' - 1&2	
3. FRANK CERELL-1&3	
4. PAUL VIRUET-1&3	
	For Defendant:
	(2) Martin J. Siegel
	250 W. 57th St, NYC 10019
	tele: 586-1410

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(01)					
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					
18:371 Consp. to steal from interstate shipment.(Ct.1)					
18:659 Theft from interstate shipment.(Cts.2&3)					
(Three Counts)					

DATE	PROCEEDINGS
1-25-74	Filed indictment. B/W ordered as to all defts. Weinfeld, J.
	B/W issued.
1-4-74	Deft. Rogers.(atty. present) Pleads not guilty. Motions returnable in 10 days. Bail fixed by Mag. continued. (\$25,000. P.R.B.)
	Assigned to Judge Wyatt as a related matter. Cannella, J.
1/12/74	Case re-assigned to Tyler, J. Cannella, J.
11-8-74	Pre-trial conference held. Wyatt, J.
11-6-74	LEON ROGERS filed Warrant for Arrest of Deft. with marshal's return. Executed Warrant on 11-11-74.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1-25-74	LEON ROGERS-Filed the following papers received from Magistrate Raby. (Mag.#74-1354). Docket Entry Sheet Indictment Warrant, S.D.N.Y. Disposition Sheet Appearance Bond in the sum of \$25,000 unsecured P.R.B.		
2/2/74	F. Cerrell, Jr. and P. Viruet- Filed papers orig. filed with Magistrate Raby (1) docket entry sheet (2) indictment warrant (3) disposition sheet (4) appointment of counsel (5) notice of appearance (6) appearance bond		
3/7/75	Filed affdvt. of John Timbert for writ of habeas corpus ad testificandum for Chester Crawford. Writ issued, returnable 1/10/75.		
3-21-75	Filed Govt.'s notice of readiness for trial.		
4-4-75	Filed Govt.'s affdvt. re: writ of habeas corpus ad pros. for Samuel Eason ret. 3/17/75.		
4-7-75	S. Eason- filed notice of appearance by atty. Martin J. Siegel.		
4-31-75	Mailed notice of reassignment.		
4-4-75	Pre-trial conference held. Not guilty pleas entered by defts. Eason, Cerrell & Viruet. Trial date set May 19th.....Owen, J.		
4-18-75	SAM EASON-Filed CJA Form 21 Copy 5 appointing Larry Jones as investigator, dated 11-3-75.....Owen, J.		
4-18-75	SAM EASON-Filed CJA Form 21 Copy 2 approving payment to Larry Jones, dated 11-3-75.Owen, J.		
4-09-76	SAMUEL EASON-Filed Writ of Habeas corpus with marshal's return. Deft. returned to Dannemora, Penitentiary, Dannemora, N.Y. on 12-30-75.		

DATE	PROCEEDINGS
01-09-76	SAMUEL EASON-Filed warrant for arrest with marshal's return. Returned unexecuted.
01-12-76	LEON ROGERS-Filed CJA Form 20 Copy 2 approving payment to Lawrence Layner, dated 1-6-76. (filed notice)
01-28-76	LEON ROGERS-Filed CJA Form 20 on left's motion for reduction of sentence. Motion dated 1-28-76. (filed notice)

Relony	JUDGE/	Assigned Trial	U. S. vs. VIRUET, PAUL	Day, Mo., Yr.	10	10	75	Docket No.	0979	04
Offense	0802	0862		No. of	04					
Defendant	0802	1		Defendants						

CHARGES	18:371	Consp. to commit theft,	COUNTS	1	MAGR. CASE NO.	
	18:659	Theft fr. interest shipmt.		3		
KEYS	T. Gorman Reilly, AUSA.	A. Isadore Eibel, 170 B'way, N.Y.C. 10038				
	(212) 791-1923	227-6798				

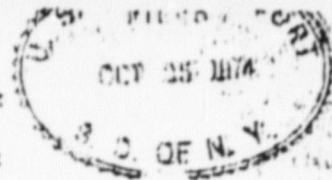
ARRAIGNMENT	12-10-75	12-10-75	12-10-75	12-18-75	02-06-76
	X	X	X	X	X

Search Warrant	Issued	DATE	INITIAL/No	INITIAL APPEARANCE	INITIAL/No	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING		Dismissed
Summons	Issued			Date Scheduled		Held for District GJ
	Served			Date Held		Held to Answer to U. S. District Court
Arrest Warrant				Waived		AT
COMPLAINT				Not Waived		Magistrate's Initials
OFFENSE (In Complaint)				Tape No.	INITIAL/No	

Show last names and suffix numbers of other defendants on same indictment/information		V. Excludable Delay	
Rogers-1; Eason-2; Cerell-3.		(a)	(b)
DATE	PROCEEDINGS	(c)	(d)
10-10-75	Filed indictment.		
12-11-75	Filed Govt's. demand for notice of intention to offer alibi defense.		
12-10-75	Jury trial begun before Owen, J.		
12-11-75	Trial continued.		
12-12-75	Trial continued.		
12-15-75	Trial continued.		
12-16-75	Trial continued.		
12-17-75	Trial continued.		
12-18-75	Trial continued, & deliberations begun & concluded. Verdict - Guilty on both counts. Sentence 2-5-75 at 2:15 P.M. Pre-sentence investigation ordered. Bail continued.....Owen, J.		
02-06-76	Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR AND ONE (1) DAY on each Counts 1 and 3, to run CONCURRENTLY with each other. The Deft. is to serve the first SIX (6) MONTHS of said sentence pursuant to Title 18, U.S.C. Sec. 3651 and is placed on PROBATION for the balance, subject to the standing probation order of this Court. Bail is continued pending appeal.....Owen, J. Issued commitment 2-10-76.		

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
02-10-76	Filed CJA Form 23 - Deft's. financial affidavit.				
02-10-76	Filed Deft's. notice of appeal from the judgment entered on 2-6-76. (mailed copies to A. Isadore Eibel, 170 B'way., N.Y.C. 10038 and U.S. Attorney's Office.				
03-08-76	Filed Form CJA 20 Copy 2 approving payment to Isadore Eibel - 170 Bway, NYC 10038.....Owen J dtd. 2/17/76.				
		(a)	(b)	(c)	(d)
		Interval	Start Date	End Date	Total Days
		(per Section III)			

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA

INDICTMENT

LEON ROGERS, ROBERT EASON,
FRANK CERRELL, JR., and PAUL VIENET,
Defendants.

74 Cr 1003

THE CHARGE

The Grand Jury charges:

1. From or about the 15th day of October 1971,

and in and including the time of the filing of this indictment, LEON ROGERS, ROBERT EASON, FRANK CERRELL, JR., and PAUL VIENET, the defendants, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together, and with each other, and with certain persons to be hereinafter named, to commit and cause to be committed certain acts, to wit, to violate Title 18, United States Code, Section 873.

It was a part of said conspiracy, that LEON ROGERS and ROBERT EASON, a/k/a "Master," and certain of their co-conspirators would unlawfully, wilfully and knowingly steal and take and carry away from a motor truck with intent to convert to their own use, goods which were being so or interstate shipment of freight.

2. It was further a part of said conspiracy that LEON ROGERS and ROBERT EASON, a/k/a "Master," and certain of their co-conspirators would unlawfully, wilfully and knowingly take, carry, and deliver said goods to defendants FRANK CERRELL, JR. and PAUL VIENET.

3. It was further part of said conspiracy that defendants FRANK CERRELL, JR. and PAUL VIENET would unlawfully, wilfully and knowingly buy, receive, have in their possession, sell and dispose of the aforesaid goods, knowing said goods to have been stolen, as set forth above in paragraph 2 of this count of the indictment.

BEST COPY AVAILABLE

OVERT ACTS

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York, and elsewhere:

1. In or about February 1973 LEON ROGERS, SAMUEL EASON, a/k/a "Buster," Chester Crawford, Carlton Boyd, and James Dixon met in the vicinity of 121st Street and Manhattan Avenue in Manhattan in New York City.
2. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, double parked an automobile in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
3. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd stood in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
4. On or about the 21st day of February 1973 Chester Crawford parked a automobile in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
5. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd entered the automobile driven by Chester Crawford in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
6. On or about the 21st day of February 1973 Chester Crawford drove an automobile, with SAMUEL EASON, a/k/a "Buster," and Carlton Boyd as passengers, behind a Modern Trucking Company motor truck from the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue in Manhattan in New York City.
7. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, drove behind the automobile driven by Chester Crawford from the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue in Manhattan in New York City.
8. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd got out of the automobile driven by Chester Crawford and got into the cab of the Modern Trucking Company motor truck.

9. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd directed the driver of the Modern Trucking Company motor truck to drive several blocks.

10. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," Carlton Boyd, LEON ROGERS, and James Dixon placed the truck driver in the back seat of the automobile driven by LEON ROGERS.

11. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, drove around New York City with the truck driver in the back seat of the automobile.

12. On or about the 21st day of February 1973 Carlton Boyd drove the Modern Trucking Company motor truck, with SAMUEL EASON, a/k/a "Buster," as a passenger, from downtown Manhattan in New York City to Long Island.

13. On or about the 21st day of February 1973 Chester Crawford drove an automobile from downtown Manhattan in New York City to Long Island.

14. On or about the 21st day of February 1973 Chester Crawford had a telephone conversation with PAUL VIRUET.

15. On or about the 21st day of February 1973 Chester Crawford had a telephone conversation with FRANK CERELL, JR.

16. On or about the 21st day of February 1973 FRANK CERELL, JR. and PAUL VIRUET travelled in an automobile on Long Island.

17. On or about the 21st day of February 1973 PAUL VIRUET, SAMUEL EASON, a/k/a "Buster," Carlton Boyd, and Chester Crawford unloaded the Modern Trucking Company motor truck at FRANK CERELL, JR.'S home on Long Island.

(Title 18, United States Code, Section 371)

COUNT TWO

The Grand Jury further charges:

On or about the 21st day of February 1973, in the Southern District of New York, LEON ROGERS and SAMUEL FASON, a/k/a "Buster," defendants, unlawfully, wilfully and knowingly, and with intent to convert to their own use, did steal, take and carry away from a Modern Trucking Company motor truck goods of a value greater than \$100, to wit, 166 cartons of children's wear, which were moving as, which were a part of, and which constituted an interstate shipment of freight and express.

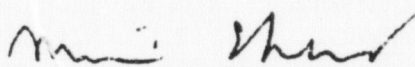
(Title 18, United States Code, Sections 659 and 2)

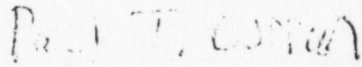
COUNT THREE

The Grand Jury further charges:

On or about the 21st day of February 1973, on Long Island, FRANK CEREILL, JR and PAUL VIRCHET, defendants, unlawfully, wilfully and knowingly did buy, receive and have in their possession goods of a value greater than \$100, to wit, 168 cartons of children's wear, which had been unlawfully stolen, taken and carried away from a motor truck in interstate commerce in the Southern District of New York, knowing the said goods to have been stolen and unlawfully taken and carried away from a motor truck.

(Title 18, United States Code, Sections 659 and 2)


FOREMAN


PAUL J. CURRAN
United States Attorney

74 CR 1003

Form No. USA-225-7-1 (Rev. 9-25-53)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

LEON ROGERS, SAMUEL EASON,
a/k/a "Buster", FRANK CERELL, JR.,
and PAUL VIRVET,

Defendant.

INDICTMENT

74 Cr.

(Title 18, United States Code, Sections
371, 659 and 2)

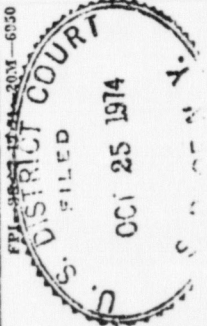
PAUL J. CURRAN

United States Attorney

A TRUE BILL

W. J. Shaw

Foreman.



JUDGE OWEN

FILE

OCT 25 1974 All defendants

TYLER, J.

BENCH WARRANTS ORDERED.

Wilmington, J.

NOV 4 1974

*Def't: Jones appears (atty
L. Lerner, Present) both please n/y.
Case referred to Wyatt, J. as a related
matter to delay for motions. Deal
Cost as Presently presented by the Prosecutor
at \$25,000 P.R.
Canella, J.*

NOV 3 1974

Re: and confer. held.

Wyatt, J.

NOV 12 1974

*Case Re-assigned to
Tyler, J.
Canella, J.*

AFR 1

1975

1975 P.A.C. HOLD. N/A PLANS OUTLINED BY DEPT. 273502V;
COROLL; & VIRULT. TRIAL DATE SET FOR MAY 1976.
 OWAN, J.

d

27th May

Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

75 CRIM 979

INDICTMENT

LEON ROGERS, SAMUEL EASON,
a/k/a "Buster", FRANK CERELL, JR.,
and PAUL VIRUET,

VS. Cr.

Defendants.

COUNT ONE

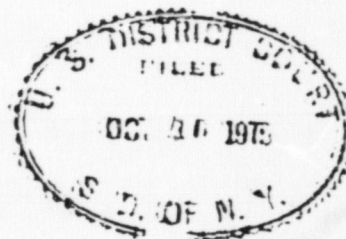
The Grand Jury charges:

1. From on or about the 15th day of October 1972, and up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, LEON ROGERS, SAMUEL EASON, a/k/a "Buster," FRANK CERELL, JR. and PAUL VIRUET, the defendants, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together, and with each other, and with persons to the Grand Jury known and unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 859.

2. It was a part of said conspiracy that LEON ROGERS and SAMUEL EASON, a/k/a "Buster," and certain of their co-conspirators would unlawfully, wilfully and knowingly steal and take and carry away from a motor truck, with intent to convert to their own use, goods of a value in excess of \$100 which were moving as an interstate shipment of freight.

3. It was further a part of said conspiracy that LEON ROGERS and SAMUEL EASON, a/k/a "Buster," and certain of their co-conspirators would unlawfully, wilfully and knowingly take, carry, and deliver said goods to defendants FRANK CERELL, JR. and PAUL VIRUET.

4. It was further part of said conspiracy that defendants FRANK CERELL, JR. and PAUL VIRUET would unlawfully, wilfully and knowingly buy, receive, have in their possession, sell and dispose of the aforesaid goods, knowing said goods to have been stolen.



MICROFILM

OCT 10 1975

OVERT ACTS

n-957

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York, and elsewhere:

1. In or about February 1973 LEON ROGERS, SAMUEL EASON, a/k/a "Buster," Chester Crawford, Carlton Boyd, and James Dixon met in the vicinity of 121st Street and Manhattan Avenue in Manhattan in New York City.
2. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, double parked an automobile in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
3. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd stood in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
4. On or about the 21st day of February 1973 Chester Crawford parked in an automobile in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
5. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd entered the automobile driven by Chester Crawford in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
6. On or about the 21st day of February 1973 Chester Crawford drove an automobile, with SAMUEL EASON, a/k/a "Buster," and Carlton Boyd as passengers, behind a Modern Trucking Company motor truck from the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue in Manhattan in New York City.

7. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, drove behind the automobile driven by Chester Crawford from the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue in Manhattan in New York City.

8. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd got out of the automobile driven by Chester Crawford and got into the cab of the Modern Trucking Company motor truck.

9. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster", and Carlton Boyd directed the driver of the Modern Trucking Company motor truck to drive several blocks.

10. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster", Carlton Boyd, LEON ROGERS, and James Dixon placed the truck driver in the back seat of the automobile driven by LEON ROGERS.

11. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, drove around New York City with the truck driver in the back seat of the automobile.

12. On or about the 21st day of February 1973 Carlton Boyd drove the Modern Trucking Company motor truck, with SAMUEL EASON, a/k/a "Buster", as a passenger, from downtown Manhattan in New York City to Long Island.

13. On or about the 21st day of February 1973 Chester Crawford drove an automobile from downtown Manhattan in New York City to Long Island.

14. On or about the 21st day of February 1973 Chester Crawford had a telephone conversation with PAUL VIRUET.

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16. On or about the 21st day of February 1973 FRANK CERELL, JR. and PAUL VIRUET travelled in an automobile on Long Island.

17. On or about the 21st day of February 1973 PAUL VIRUET, SAMUEL EASON, a/k/a "Buster", Carlton Boyd, and Chester Crawford unloaded the Modern Trucking Company motor truck at FRANK CERELL, JR.'s home on Long Island.

(Title 18, United States Code, Section 371)

The Grand Jury further charges:

On or about the 21st day of February 1973, in the Southern District of New York, LEON ROGERS and SAMUEL EASON, a/k/a "Buster", defendants, unlawfully, wilfully and knowingly, and with intent to convert to their own use, did steal, take and carry away from a Modern Trucking Company motor truck goods of a value greater than \$100, to wit, 168 cartons of children's wear, which were moving as, which were a part of, and which constituted an interstate shipment of freight and express.

(Title 18, United States Code, Sections 659 and 2)

COUNT THREE

The Grand Jury further charges:

On or about the 21st day of February 1973, on Long Island in the Eastern District of New York, FRANK CERELL, JR. and PAUL VIRUET, defendants, unlawfully, wilfully and knowingly did buy, receive and have in their possession goods of a value greater than \$100, to wit, 168 cartons of children's wear, which had been unlawfully stolen, taken and carried away from a motor truck in interstate commerce, knowing the said goods to have been stolen and unlawfully taken and carried away from a motor truck.

(Title 18, United States Code, Sections 659 and 2)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By M. Guil
Deputy Clerk

DEP.

Patrick Boland
FOREMAN

Paul A. Curran
PAUL J. CURRAN
United States Attorney

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

LEON ROGERS, SAMUEL EASON,
a/k/a "Buster", FRANK CERELL, JR.,
and PAUL VIRUET,

Defendants.

INDICTMENT

S 75

(18 U.S.C. §§ 371, 659 and
2.)

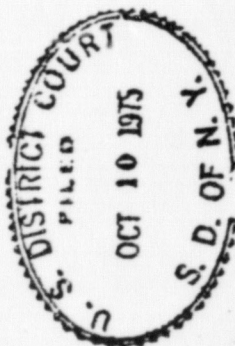
PAUL J. CURRAN

United States Attorney.

A TRUE BILL

Patrick Boland
Del Foreman.

FPI-88-2-19-71-2001-0950



OCT 20 1975 - DEF. EASON PRESENT W/ATTY. (MARTIN STICKER)
DEF. PROPS GUILTY TO CT. 1 ONLY CT. 2 REMAINS OPEN.
P.S.I. ORRORNO. SUMMER FOR DEC. 5TH @ 2:17 P.M. RM 1115

AWAY.

12-1-75 - SUMMER FOR OCT. WASON NOT GO DEC. 1975 @ 2:11 P.M.

AWAY.

DEC 10 1975 - COURT'S MOTION TO SEVERE LEON ROGERS FROM
THIS INDICT. IS GRANTED.

AWAY.

DEC 10 1975 - TRIDE BLON AS TO DEF. CERELL & VIRUET

DEC 11 1975 - TRIDE CONT'D.

DEC 11 1975 - DEF. ROGERS APPEARS ON W/ATTY. (MARTIN STICKER)
PLAINTS GUILTY TO CT. 2. CT. 1 REMAINS OPEN WITH DEF. EASON.
SUMMER FOR DEC. 1975 @ 2:11 P.M.

AWAY.

DEC 12 1975 - TRIDE CONT'D.

DEC 13 1975 - TRIDE CONT'D.

DEC 16 1975 - TRIDE CONT'D.

DEC 17 1975 - TRIDE CONT'D.

DEC 18 1975 - TRIDE CONT'D. & PRESENTATIONS BEING CONCERN
W/ATTY. GUILTY - BISH OFFIC (CERELL & VIRUET) DEF. EASON
SUMMER FOR DEC. 2:11 P.M. P.S.I. W/ATTY. STICKER

11-1 - JEFF ROBERT PRISON (w/entry label) FOR SENTENCING.
CT 2 - 1 1/2 YRS TO COMMENCE UPON EXPIRATION OF FED. TERM
NEW SERVICE. CT. 1 IS DISM.

DET. WATSON - PRISON (w/entry - ^{OWEN, J.} ~~SIX~~) FOR SENTENCING.
CT 1 - 1 1/2 YRS TO COMMENCE UPON EXPIRATION OF STATE SERVICE
NEW SERVICE. CT. 2 IS DISM.

OWEN, J.

R

6-76 - DET. COLE PRISON (w/entry ~~WATSON~~) FOR SENTENCING. SENTENCE IS
1 1/2 YRS ON TEST OF CT 1 + 3 TO RUN CONCURRENTLY. CIVIL CONT'D. PENDING
APPEAL.

OWEN, J.

DET. WATSON - PRISON (w/entry ~~WATSON~~) FOR SENTENCING. SENTENCE IS
1 1/2 YRS ON TEST OF CT 1 + 3 TO RUN CONCURRENTLY. DET. IS TO SERVE
FIRST TERM ONLY. EXEC. OF REFORMATION IS SUSPENDED & DET. REMAINS ON
P.R. FOR TERM PERIOD. CIVIL CONT'D. PENDING APPEAL.

OWEN, J.

1 mblm 297

2 charge and I am going to give it to the extent you find
3 I give it. It's a fairly standard charge, as I am sure
4 you are aware.

5 All right. Let's get the jury.

6 MR. REILLY: The record reflects that there
7 has been no objection made by counsel for the defense.

8 (Jury present.)

9 THE COURT: Good morning, ladies and gentlemen.

10 Mr. Foreman, ladies and gentlemen of the jury,
11 we are at the point in this trial where you are soon to
12 undertake your final function as jurors; and it is here,
13 as I said to you at the outset of this case, that you
14 are to perform what I regard as one of the most valuable
15 duties and obligations of citizenship in this country,
16 which is to act as ministers of justice and to determine,
17 in accordance with the instructions that I will give
18 you, and in accordance with the evidence that you have
19 heard, what are the facts in this case, what happened.

20 You are to do this and discharge your duties
21 with complete fairness, complete impartiality; and as I
22 said when you were selected, you are to do it without
23 any bias or prejudice for or against the government or
24 for or against Mr. Cerell or Mr. Viruet, either of the
25 defendants, as parties to this case.

1 mblm 298

2 This is an important case, obviously to both
3 sides as well as to the public at large. The fact that
4 the government is a party here entitles it to no greater
5 consideration than that given any other party, and in
6 any other case. By the same token, it is entitled to
7 no less consideration. All parties, whether it is the
8 government, an individual, a corporation or whatever,
9 all stand alike and as equals before the bar of justice.

10 In passing, on the fact issues here, which is
11 your role, you are the sole and exclusive judges of those
12 facts. This is not my province. This is your province.
13 You determine the weight of the evidence; you appraise
14 the credibility or believability of the witnesses you
15 have heard; you draw such reasonable inferences from
16 the evidence as you think are warranted; you resolve such
17 conflicts as you may find exist in the evidence. In
18 doing this, I will later give you some thoughts as to
19 how you can be assisted in determining these issues and
20 determining the questions of credibility or believability
21 that you may find.

22 My final function as the judge, is to instruct
23 you as to the law; and it is your duty, I charge you that
24 it is your duty to accept these instructions of mine
25 and apply them to the facts as you may find them.

1
2 With respect to any fact matter, it is your
3 recollection and yours alone that governs as to what the
4 testimony was. I think I may have told you sometime
5 early in the case or otherwise, that anything that any
6 attorney has said in this case with respect to any
7 testimony, whether during trial, in a question, in an
8 argument, in summation, or anywhere else, is not to be
9 substituted for your own recollection of the evidence.

10 So too, anything that I may have said or may
11 have referred to during the course of the trial or even
12 during the course of this charge, with regard to any
13 matter in evidence, is not to be taken in place of your
14 own recollection as to what the testimony was. If you
15 wish to consider any exhibit, you have only to ask for it
16 and it will be made available for your consideration.

17 Before we get to the precise charges here,
18 let me turn to a few preliminary things:

19 Let me say that the fact that there are, in
20 Count 1, there are two persons named, Leon Rogers and
21 Samuel Eason, as defendants, who were not on trial before
22 you, that fact is not to enter into your consideration
23 or to be the subject of any conjecture by you or play
24 any part whatsoever in your deliberations.

25 The indictment in this case contains two

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2 counts, and two of the defendants are on trial before
3 you: Mr. Cerell and Mr. Viruet. You are to pay attention
4 only to the evidence concerning those two gentlemen. In the
5 determination of their innocence or guilt, you must
6 bear in mind that guilt is a personal thing. The guilt
7 or innocence of the defendant on trial before you must
8 be determined separately with respect to him, solely on
9 the evidence presented against him, or the lack of
10 evidence as the case may be.

11 The case of each defendant stands or falls on
12 the proof or lack of proof of the charges against him
13 and not against anybody else. Therefore, the fact that
14 Samuel Eason, nicknamed "Buster," -- as we heard him, one
15 of the defendants named in the first count of this
16 indictment--pleaded guilty, is not evidence of the guilt
17 of any other defendant. Nor is it evidence that the
18 crimes charged were committed. It may not be considered,
19 in any event. Nor may any adverse inference be drawn
20 against any defendant on trial by reason of the fact
21 that Mr. Eason took a plea.

22 As I said, the guilt or innocence of the
23 defendants on trial must be determined by you solely
24 upon the evidence introduced against them or the lack of
25 it, and not on any evidence introduced against anybody

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2 else.

3 There are certain principles of law which
4 apply in every criminal case. I may have made reference
5 to some of them when you were selected as jurors, and
6 I am going to repeat them now. This indictment is a
7 number of pieces of paper. It is merely a charge. It
8 is no evidence of anything. It is not proof of the
9 defendant's guilt, and no weight whatsoever is to be
10 given to the fact that an indictment has been returned
11 here. Each defendant has pleaded "Not guilty" to the
12 charges that are typed upon these pieces of paper. Thus,
13 the government at all times throughout the course of this
14 trial has the burden of proving the charges against each
15 defendant beyond a reasonable doubt.

16 A defendant does not have to prove his
17 innocence. A defendant does not have to prove anything.
18 On the contrary, a defendant is presumed to be innocent
19 of the charges contained in this indictment. This
20 presumption of innocence was in his favor at the sta
21 of the trial. It continued in his favor through the
22 testimony taking. It is in his favor even as I am
23 instructing you at this moment, and remains in his favor
24 during the course of your deliberations in the jury room.

25 The presumption of innocence is removed only

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2 if and only when you are satisfied that the government
3 has sustained its burden of proving the guilt of a
4 defendant beyond a reasonable doubt. At that point, the
5 presumption of innocence would fall away.

6 The question that comes up is: What is a
7 reasonable doubt? The words, as you can see, practically
8 define themselves. It is a doubt founded upon reason,
9 and arising out of the evidence in the case, or the lack
10 of evidence, as the case may be. It is a doubt which a
11 reasonable person has, after carefully weighing all the
12 evidence. Reasonable doubt is a doubt which appeals
13 to your reason, your judgment, your common sense, and
14 your experience. It is not caprice, whim, speculation,
15 guesswork, conjecture, or suspicion. Reasonable doubt
16 is not an excuse to avoid the performance of an unpleasant
17 duty. It is not sympathy for a defendant.

18 If, after a fair and impartial consideration
19 of all the evidence, you can candidly and honestly say
20 that you are not satisfied with the guilt of a defendant;
21 that you do not have an abiding conviction of his guilt;
22 then in sum, if you have such a doubt as would cause you
23 as a prudent person to hesitate before acting in matters
24 of importance to yourself, then you have a reasonable
25 doubt. In that circumstance, it is your duty to acquit.

1
2 If on the other hand, after such impartial and
3 fair consideration of all the evidence, you can candidly
4 and honestly say that you do have an abiding conviction
5 of a defendant's guilt, such a conviction as you would
6 be willing to act upon in importance and weighty matters
7 in the personal affairs of your own life, then you have
8 no reasonable doubt, and under such circumstances, it
9 is your duty to convict.

10 One final word on this subject:

11 Reasonable doubt does not mean "a positive
12 certainty," or "beyond all possible doubt." If that
13 were the rule, few persons, however guilty, would ever
14 be convicted. It is practically impossible for a person
15 to be absolutely and completely convinced of any
16 controverted fact which by its nature cannot be proved
17 by mathematical certainty. Therefore, the law in a
18 criminal case is that it is sufficient that the guilt
19 of a defendant be established beyond a reasonable doubt,
20 not beyond all possible doubt.

21 As I have said, the indictment in this case
22 against Mr. Cerell and Mr. Viruet contains two counts.
23 Each count charges a separate crime. I am going to read
24 the indictment to you:

25 Count 1: "From on or about the 15th day of

1 October, 1972, up to and including the date of the filing
2 of this indictment," -- and you may have a copy of the
3 indictment in the jury room -- "in the Southern District
4 of New York and elsewhere," -- and I charge you that the
5 Southern District of New York includes the counties of
6 Manhattan and The Bronx and a number of counties up
7 toward Albany, which are not relevant to any proof that
8 we've heard -- "from on or about the 15th day of October,
9 1972 up to and including the date of the filing of this
10 indictment," -- and it was filed on the 10th of October,
11 1975 -- "in the Southern District of New York and else-
12 where; Leon Rogers, Samuel Eason, Frank Cerell, Jr., and
13 Paul Viruet, the defendants, unlawfully, wilfully, and
14 knowingly did combine, conspire, confederate and agree
15 together and with each other, and with persons to the
16 grand jury known and unknown, to commit offenses against
17 the United States, to wit, to violate Title 18, United
18 States Code, Section 659." -- I will give you the details
19 on these later.
20

21 "It was part of said conspiracy that Leon
22 Rogers; and Samuel Eason, also known as "Buster," and
23 certain of there co-conspirators, would unlawfully, wil-
24 fully, and knowingly steal and take and carry away from
25 a motor truck, with intent to convert to their own use,

goods of a value in excess of \$100, which were moving as an interstate shipment of freight.

"It was further a part of said conspiracy that Leon Rogers and Samuel Eason and certain of their co-conspirators would unlawfully, wilfully and knowingly carry and deliver said goods to defendants Frank Cerell, Jr. and Paul Viruet.

"Four: It was further part of said conspiracy that defendants Frank Cerell, Jr. and Paul Viruet would unlawfully, wilfully, and knowingly buy, receive, have in their possession, sell, and dispose of the aforesaid goods, knowing said goods to have been stolen, as set forth in Paragraph 2 of this count of the indictment."

There are listed some overt acts which I will speak to you about later.

Count 2 charges: "On or about the 21st day of February, 1973, on Long Island, in the Eastern District of New York,"-- and Long Island, Brooklyn and Queens are in the Eastern District for your information -- "Frank Cerell, Jr. and Paul Viruet, defendants, unlawfully, wilfully, and knowingly did buy, receive, and have in their possession goods of a value greater than \$100, to wit, 168 cartons of children's wear, which had been unlawfully stolen, taken, and carried away from a

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motor truck in interstate commerce, knowing the said goods to have been stolen and unlawfully taken and carried away from the motor truck."

Now, the first count charges a conspiracy. It charges that all the defendants named in the indictment, together with other to the grand jury known and unknown, conspired to violate a federal law; that is, they agreed to steal a truck and its contents, which was moving in interstate commerce, and thereafter, to deliver the stolen contents to Defendants Cerell and Viruet to dispose of. I shall refer to this count as the "conspiracy count."

The second count of the indictment, I shall refer to as the "substantive count." In that count, Mr. Cerell and Mr. Viruet are charged with possession of goods stolen from an interstate shipment, knowing that they had been stolen. A conspiracy to commit a crime is an entirely separate and distinct offense from the substantive crime which is the objective of the conspiracy. A conspiracy, sometimes referred to as a "partnership in crime" because it involves collective or organized action presents a greater potential threat to the public interest than the illicit activity of a single individual.

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It was for these and other reasons that Congress made conspiracy an entirely separate, distinct, and different violation from the law or laws which might be the objective of the conspiracy.

The essence of a criminal conspiracy is an agreement or understanding to violate another law or laws. Thus, if a conspiracy exists, even if it should fail in its purpose, it is still punishable as a crime. Consequently, in a conspiracy charge, there is no need for the government to prove an actual violation of federal law, although here, obviously, the government contends that it has proved an actual violation as well; that is, the government contends that it has not only proved the agreement to highjack an interstate shipment and fence its contents, but also that it has proved the actual receipt by the fences of the stolen merchandise itself.

Since the essential elements for conviction on a substantive count, that is Count 2 of this indictment, are somewhat different from the essential elements of the crime of conspiracy, let us consider each count separately -- and I believe it will be somewhat clearer for you if we first discuss the substantive count, that is, Count 2.

Count 2 alleges a violation of Section 659 of Title 18 of the United States Code, which provides in pertinent part as follows:

"Whoever buys or receives or has in his possession any such goods or chattels," -- and this has to do with chattels unlawfully stolen or taken away from a motor truck or other vehicle moving in interstate commerce having the value of more than a hundred dollars-- "whoever buys or receives or has in his any such possession, any such goods or chattels, knowing the same to have been embezzled or stolen is guilty of a crime."

Count 2 of the indictment charges Cerell and Viruet with the illegal possession of such stolen goods. In order to find either Defendant Cerell or Viruet guilty of the crime charged in Count 2, you must find each of the following elements beyond a reasonable doubt:

First, that the cartons of merchandise were, in fact, stolen from a Modern Trucking Co. vehicle in Manhattan.

Second, that at the time of the theft, the cartons were part of an interstate shipment; that is, that they were on their way from New York to New Jersey.

Third, that the defendant you are considering

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2 had the cartons of goods in his possession.

3 Fourth, that the said defendant knew the
4 cartons to have been stolen.

5 Fifth, that the cartons had a value in excess
6 of a hundred dollars.

7 Let me read those to you again:

8 "First, the cartons of merchandise were, in fact,
9 stolen from a Modern Trucking Co. vehicle in Manhattan.

10 "Second, that at the time of the theft, the
11 cartons were part of an interstate shipment; that is,
12 were on their way from New York to New Jersey.

13 "Third, that the defendant you are considering,
14 had the cartons of goods in his possession.

15 "Fourth, that the said defendant knew the cartons
16 to have been stolen.

17 "Fifth, that the cartons had a value in excess
18 of a hundred dollars."

19 Now, let us define some of these terms. I am
20 sure we all have a pretty good layman's idea of what the
21 word "steal" means, but we must be precise in this case.

22 To steal means: "To obtain goods belonging
23 to another, with intent to deprive the owner of the
24 rights and benefits of ownership."

25 As to the theft being of an interstate shipment,

I charge you that goods intended by a shipper to be shipped to another state, become part of interstate commerce as soon as they have finally left the shipper's possession; and are in interstate commerce while in the possession of a carrier or a trucking company which is to forward them on such journey.

This means that the government, to prevail on the substantive count, must prove that the cartons in question were, in fact, being sent by a shipper in New York with the intention that they be transported across a state line to a distribution point or warehouse in New Jersey. The government is not required to prove that a defendant knew the goods to have been stolen from such an interstate shipment. On the substantive count, and this is a distinction that you must pay careful attention to, on this count, the substantive count, the government must only show that the goods were intended to be shipped in interstate journey from the seller to the buyer, and that the defendant you are considering, knew them to have been stolen.

In other words, you have to find:

One, that they were in an interstate shipment.

Two, that the defendant knew them to have been stolen.

1 But you do not need, on the substantive count,
2
3 to find that the defendant actually knew they were
4 moving across a state line in an interstate shipment.
5 In the conspiracy count, you do, and I will come back
6 to that a little bit later.

7 As to the word "possession" the children's
8 wear, if you so find, and the other merchandise, were
9 in the defendant's "possession," if you find that the
10 defendant had them in his power or control--obviously a
11 truck load of cartons cannot be taken by a person and
12 put in his pocket or held in his hand, but it is in his
13 possession if a carton or cartons are under his command
14 or in his control.

15 The government contends the defendants had
16 possession of these cartons when, if you find at their
17 direction, they were stored at Mr. Cerell's house and
18 were theirs to dispose of. If you credit the testimony
19 to this effect, this would be possession as the law
20 defines it. Possession by a defendant can be either actual
21 or constructive.

22 Constructive possession means that, although
23 the goods are in the physical possession of somebody
24 else, if a defendant knowingly has the power to exercise
25 control over them or over their distribution, or what's

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2 done with them, that defendant has constructive
3 possession.

4 In connection with this count, I also want to
5 define for you the terms "knowingly" and wilfully,"
6 should it become appropriate to apply them.

7 An act is done knowingly, if it's done volun-
8 tarily and purposely and not because of mistake, accident,
9 mere negligence, or some other innocent reason.

10 An act is done wilfully, if it is done know-
11 ingly and deliberately.

12 As to the fifth element, "value," you are
13 instructed that the value in this context means: the
14 cost price, either wholesale or retail, whichever is
15 greatest. You need not find that each piece of
16 children's wear had a value in excess of \$100. The
17 question is whether the total value of the merchandise,
18 which the government contends was put in the possession
19 of the defendants, exceeded a hundred dollars.

20 Now, let us turn to the conspiracy count.
21 Title 18, U.S., Section 371, provides as follows:

22 "if two or more persons conspire to commit any
23 offense against the United States, and one or more of
24 such persons does an act to effect the object of the
25 conspirators, each is guilty of a crime."

✱

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2 In order to find a defendant guilty of conspiracy,
3 as is charged in the first count of the indictment, you
4 must find each of the following elements beyond a reason-
5 able doubt:

6 First, that at some time during the period from
7 on or about October 15 to October 25, 1975, the date of
8 the filing of the indictment, you must find that an
9 agreement existed between the defendant you are consider-
10 ing and the co-conspirators, Crawford, Boyd, and Dixon,
11 or others charged.

12 Second, that it was an object of this agreement:

13 One: For certain of the co-conspirators to
14 steal goods, from a motor truck, that would be shipped in
15 interstate commerce.

16 Second: That the defendant you are con-
17 sidering would receive these goods to sell and dispose of.

18 Third: That the defendant knowingly
19 associated himself with this conspiracy or agreement and
20 participated in it.

21 Fourth: That one of the co-conspirators
22 knowingly committed at least one of the overt acts--which
23 I will get to in a moment--set forth in the indictment,
24 at or about the time and place charged.

25 Fifth: That either the agreement was

formed in the Southern District of New York, or an overt act occurred in the Southern District of New York.

As I have said before, the Southern District includes Manhattan and The Bronx, but does not include Brooklyn, Queens and Long Island.

Let me give you those again, so that you have those firmly in mind, because those are the elements you have to consider:

First, that at some time during the period from on or about October 15, 1972 to when the indictment was filed, October 25, 1975, an agreement existed between the defendant under consideration, and any co-conspirator, as charged: Crawford, Boyd, Dixon, or anyone else so charged by the grand jury.

Second, that it was an object of this agreement that certain of the co-conspirators would steal goods from a motor truck, which goods were being shipped in interstate commerce. That the defendant--and in this regard, the object of this agreement has to be that the defendant knew that the goods were being shipped in interstate commerce; that a member of the conspiracy knew that it was part of the agreement that the shipment from which the goods would be stolen was moving in interstate commerce; and, two, that Defendants Cerell

and/or Viruet, whoever you are considering, would receive these goods to sell and dispose of.

Three, that the defendant knowingly associated himself with the conspiracy and participated in it.

Four, that one of the conspirators knowingly committed at least one of the overt acts at or about the time and place alleged.

Fifth, that either the agreement was formed in the Southern District or an overt act occurred in the Southern District.

Now I will get down to details on that.

Let's consider the first element:

As you gather, a conspiracy is an agreement, or an understanding by two or more persons to accomplish a criminal or unlawful act. To establish this, the government is not required to show that two or more persons sat around a table and entered into a solemn pact orally or in writing, stating that they have formed a conspiracy, or to set forth the details or the means by which it is to be achieved. Your common sense will tell you, I am sure, that when persons in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. What the evidence must show in order to establish that a conspiracy existed, is that its

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2 members in some way or manner expressly or by implication,
3 came to a common understanding to violate the law or to
4 accomplish an unlawful plan.

5 To determine whether there has been such a
6 conspiracy, you may judge the facts and the conduct of
7 the alleged co-conspirators, which are done to carry out
8 an apparent criminal purpose. The old adage: "Actions
9 speak louder than words," is obviously applicable here.
10 Often the only evidence available is that of the dis-
11 connected acts or conduct upon the part of the individuals
12 charged, which acts or conduct, however, when taken by
13 you together and considered as a whole, permit the
14 inference that the conspiracy existed as conclusively
15 as direct proof. In short, the items of evidence are
16 not to be viewed in isolation, but together with each
17 other. You are to view the totality of all the evidence.

18 I have mentioned earlier that a conspiracy has
19 sometimes been called "a partnership" for criminal
20 purposes, in which each member of it becomes an agent
21 of each other member. Each person in a conspiracy may
22 perform separate and distinct acts at different times
23 and in different places. All the conspirators need not
24 be acquainted with each other. They may not have
25 previously associated together. One of the defendants

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2 may know only one member of the conspiracy. If he enters
3 into an unlawful agreement with that other member of the
4 conspiracy, he becomes a party to the conspiracy. One
5 conspirator may play a major role while another plays a
6 minor one.

7 Thus, the guilt of one is not governed by the
8 extent, the duration, or whether he played a greater or
9 a lesser role. In other words, it is not required that
10 a person be a member of the conspiracy from the very
11 start. He may join it at some point during its progress
12 and be held responsible for all that has been done to
13 further it after he joined, and that may thereafter be
14 done during its existence while he remains a member.
15 In other words, every conspirator is fully responsible
16 for what every other co-conspirator does or says in
17 furtherance of the conspiracy, whether he knows about it
18 or not, whether he specifically approves of it or not;
19 that is, as long as you have found such a person to be a
20 member of the conspiracy.

21 So, ladies and gentlemen, you must determine
22 whether or not the proof has established here the
23 existence of the conspiracy or the agreement that is
24 charged in the indictment. In deciding this, you must
25 consider all the evidence with respect to the conduct,

2 acts, and declarations of each of the alleged co-con-
3 spirators and such inferences as you may reasonably
4 draw from that. It is sufficient to establish the
5 existence of the conspiracy if from the proof of all
6 the relevant facts and circumstances, you find beyond a
7 reasonable doubt that the minds of at least two alleged
8 co-conspirators met in an understanding way to accom-
9 plish by the means charged, the objects of the con-
10 spiracy as charged in the indictment.

11 If you do conclude that the conspiracy as
12 charged did exist, you must then determine whether Mr.
13 Cerell and Mr. Viruet here became members of it. The
14 defendant's participation in a conspiracy, if you find
15 that one existed, must be established by the independent
16 evidence of his own acts, conduct, and statements, as
17 well as those of other alleged co-conspirators, and the
18 reasonable inferences to be drawn from them. In this
19 connection, evidence was received as to other occasions
20 not charged in the indictment, when Chester Crawford
21 allegedly had dealings with each of the defendants
22 regarding other stolen items: wine, checks, for
23 example.

24 This evidence, if credited by you, is to be
25 considered only on the question of whether a defendant was

engaged in a course of conduct with Crawford, to deal in stolen items; and only to the extent that it bears, if you so find, on the fact of a defendant's connection with this particular highjacking. Neither defendant is on trial for any charge other than those contained in this indictment, and for fencing the stolen items referred to in this indictment.

To find either defendant a member of this conspiracy, you must upon all the evidence be satisfied beyond a reasonable doubt that the defendant was aware of its unlawful purpose; that he was a willing participant with intent to advance its purposes, and that he joined the conspiracy with a specific criminal intent; that is, with a deliberate purpose to violate the law.

I am not going to review the testimony, since the fact area here was relatively simple, and counsel have done it well; but I think a short review of the list of witness in this case is appropriate.

The government called Teddy Smith, who was the driver of the highjacked vehicle; Harry Hyman, who was the president of Modern Trucking; Chester Crawford, who said he was the ringleader of the highjackers; Mr. Bellikoff, who was an officer of the Tempo Foundations, one of the shippers; a Mr. Imgram, who was an employee at

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2 City Cooling; Mr. Bursey of the FBI; James Dixon, who
3 said he took Teddy and drove him around New York follow-
4 ing the highjacking; Carlton Boyd, who said he had driven
5 the truck away from the highjack scene; and FBI Agent
6 Garber.

7 Defendant Cerell called Mrs. Cerell, his wife;
8 one, Roseanne Andersen, a next-door neighbor; Mrs. Rose
9 Cerell, his mother; and Mr. Frank Cerell himself took
10 the stand before you.

11 Mr. Viruet called a Richard Waegerle, a neighbor;
12 Sam Eason, also known as "Buster," the gentlemen who said
13 he was riding the passenger side of the truck on the
14 way from the highjacking out to Long Island; Anita
15 Lauanders, an officer of City Cooling during its existence
16 before it was sold; Mr. Viruet himself took the stand,
17 and a Walter Tennery was called as his last witness.

18 The contentions of the parties hereto, although
19 there has been extensive evidence, were relatively
20 simple.

21 The government contends that it has proved
22 that there was an agreement to highjack a truck, and
23 there is no dispute that there was a highjacking of a
24 truck. The government further contends that the agree-
25 ment was that the merchandise was to be taken to the

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2 home of Mr. Cerell, or was to be put into the possession
3 of Mr. Cerell and Mr. Viruet, to dispose of as fences,
4 and that's in the first count; that's what the govern-
5 ment charges the agreement was.

6 And in the second count, the government alleges
7 that it has proved that this, in fact, was carried
8 out and that this merchandise was put into the possession
9 of the defendants for disposition as fences, and that they
10 did so dispose of it.

11 Defendants' contentions are that this did not
12 occur at all; that there was no such incident; that no
13 truck ever came to Mr. Cerell's home, and there was -- in
14 no way did they have any participation whatsoever; that
15 this is something made up by other participants to
16 further themselves in their embroilment with the law.

17 Those are the contentions that you are going
18 to have to choose between. There are, obviously, many
19 other contentions raised in the various summations and
20 I am not going to refer to those, but you should consider
21 all of the contentions and all of the evidence; and just
22 because I have summarized it in that fashion, does not
23 mean that you should not consider every aspect of the
24 case, because you should.

25 As to the second element of the conspiracy, if

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I may return to that, that second element, as you may recall, was that it was an object of the agreement that certain co-conspirators would steal goods, from a motor truck, being shipped in interstate commerce, and that Defendants Cerell and Viruet would receive these goods to sell and dispose of.

The government must establish that one of the purposes of this agreement was to achieve the substantive offense charged in Count 2 and that is, to put the defendants on trial here, in possession of stolen goods to dispose of. Thus, as in the case of Count 2, the government must establish that a defendant on trial knew that the plan was that the goods to be given him to dispose of would be stolen. In addition, with respect to the conspiracy count, the government must establish an additional element of intent. You will recall that I said, in reference to the substantive or the possession count, that it was not necessary for the government to prove that the defendant knew the goods had been moving in interstate commerce. If you found that the goods, in fact, were traveling interstate, that finding was sufficient for the federal substantive violation.

However, for the conspiracy count, for there to be a violation of the law under the conspiracy count,

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the government must establish that a defendant knew that the goods he was conspiring to steal or to fence, were to be those that were moving in interstate commerce.

In this connection, the government contended that there is proof that Crawford, one of the alleged co-conspirators, had selected Teddy's truck as the one to be highjacked sometime before, and knowing that Crawford knew that this truck regularly went through New York depot to distribution centers in New Jersey. If you find this as a fact, then you may find that this element has been satisfied.

As to all of these elements, let me repeat: it is for you to determine whether you find these facts or not.

Now, as to the third element, in determining whether a defendant became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose. Did he join it with awareness of at least some of the basic aims and purposes of the conspiracy? Knowledge is a matter of inference from facts proved. Medical science has not devised a way to permit us to go into a man's mind and know with certainty what he knew or thought at some time in the past. However, you do have before you testimony of certain acts on the part of these

1 defendants from which, if you credit that testimony from
2 which the government contends can be gleaned, and from
3 it which the government contends it has shown knowledge
4 on the part of each defendant, of an unlawful purpose to
5 this conspiracy.
6

7 It is not necessary that the defendant be
8 fully informed as to the details of the scope of the
9 conspiracy in order to justify your conclusion of knowledge
10 on his part. Also, for a finding of guilty knowledge, you
11 need not find that a defendant knew the fullest extent
12 of the conspiracy and all of its activities and actors.
13 I charge you that in this connection, you may not draw
14 an adverse inference of participation in this conspiracy
15 from the mere association or friendship of the defendant
16 and any other person. I further charge you that the
17 mere presence at the scene of an event allegedly connected
18 with the conspiracy, knowing that a crime is being
19 committed, is not sufficient to establish that a defendant
20 aided or abetted or participated in the crime unless you
21 find beyond a reasonable doubt that the defendant was
22 a participant and not **merely a knowing** spectator.

23 The existence of the conspiracy may be established
24 and one's membership in it may be established by direct
25 or circumstantial evidence.

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2 Direct evidence is where a witness testified
3 to what he saw, heard, and/or observed. What he knows
4 of his own knowledge, that which came to him through the
5 use of his own senses. That is direct evidence.

6 Circumstantial evidence, on the other hand, is
7 where facts are established from other facts from which,
8 in terms of common experience, you can logically conclude
9 that the facts sought to be established do exist.

10 Let me give you an example, so that you can
11 see what I am talking about:

12 Let's assume that when you came into the court-
13 room this morning the sun was shining, the blinds were
14 drawn, so that you could not see out, and it had been
15 a dry, clear day when you entered the building. The
16 fact it was a dry, clear day when you entered. there is
17 direct evidence, because you observed that, you looked
18 at the heavens and saw what it was.

19 But let's assume that at the close of my charge
20 a man walked in with an umbrella, and is shaking water
21 off the umbrella, walks in through that door; and another
22 man comes in and has a raincoat on with spots of water
23 all over it; you could conclude from that evidence, which
24 is direct evidence of seeing the man in the umbrella,
25 you could conclude that since the time you came into the

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1 building, the sun had stopped shining and it had begun to
2 rain. In other words, the circumstantial evidence would
3 permit you to draw a second fact from it, because of the
4 reasonable inference that was permitted. That is all
5 there is to circumstantial evidence. You infer one fact
6 which logically flows from another fact which is proven
7 before you.
8

9 Circumstantial evidence, if you believe it,
10 is of no less value than direct evidence. In either case,
11 whether the evidence is circumstantial or direct, you
12 must be convinced beyond a reasonable doubt of the guilt
13 of any defendant on any count and on each element of the
14 count.

15 If you find that the government has sustained
16 the elements of a defendant's knowing participation in
17 the conspiracy, then we reach the next element, which is
18 that an overt act to effect the object of the conspiracy
19 was committed by at least one of the co-conspirators
20 after unlawful agreement was made.

21 Now, getting down to that mysterious word, "overt
22 act," an overt act, which is a long-time honored legal
23 word, means nothing more than some step, action, or
24 conduct which is taken to achieve, accomplish, or further
25 the objectives of the conspiracy. Thus showing that the

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2 conspiracy is more than mere talk.

3 The purpose of requiring proof of an overt
4 act is that while parties might conspire and agree to
5 violate the law, they may change their mind before doing
6 anything, and do nothing to carry it into effect; in which
7 event, that would not constitute an offense. The overt
8 act which the government must prove need not be a criminal
9 act nor must the government prove all of the overt acts
10 which are alleged in the indictment. Proof of any one
11 overt act by any member of the conspiracy is sufficient
12 if you find that it has been committed beyond a reasonable
13 doubt.

14 The overt acts listed in the indictment are as
15 follows:

16 "In pursuance of said conspiracy and to effect
17 the objects thereof, the following overt acts, among
18 others, were committed in the Southern District of New
19 York and elsewhere:

20 "One: In or about February 1973, Leon Rogers;
21 Samuel Eason, also known as "Buster"; Chester Crawford;
22 Carlton Boyd and James Dixon met in the vicinity of 121st
23 Street and Manhattan Avenue in Manhattan in New York
24 City.

25 "Two: On or about the 21st day of February 1973,

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2 Leon Rogers, with James Dixon as a passenger, double-
3 parked an automobile in the vicinity of 24th Street and
4 Tenth Avenue in Manhattan in New York City.

5 "Three: On or about the 21st day of February
6 1973, Samuel Eason and Carlton Boyd stood in the
7 vicinity of 24th Street and Tenth Avenue in Manhattan
8 in New York City.

9 "Four: On or about the 21st day of February
10 1973, Chester Crawford parked in an automobile in the
11 vicinity of 24th Street and Tenth Avenue in Manhattan in
12 New York City.

13 "Five: On or about the 21st day of February
14 1973, Samuel Eason and Carlton Boyd entered the automobile
15 driven by Chester Crawford in the vicinity of 24th Street
16 and Tenth Avenue in Manhattan.

17 "Six: On or about the 21st day of February
18 1973, Chester Crawford drove an automobile with Samuel
19 Eason and Carlton Boyd as passengers, behind a Modern
20 Trucking Co. truck in the vicinity of 24th Street and
21 Tenth Avenue to the vicinity of 23rd Street and Ninth
22 Avenue in Manhattan.

23 "Seven: On or about the 21st day of February
24 1973, Leon Rogers, with James Dixon as a passenger, drove
25 behind the automobile driven by Chester Crawford, from

the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue.

"Eight: On or about February 21"--in the same year; these are all on February 21 of '73 -- "Samuel Eason and Carlton Boyd got out of the automobile driven by Chester Crawford and got into the cab of the Modern Trucking Co. truck.

"Nine: On the 21st of February, Samuel Eason and Carlton Boyd directed the driver of the Modern Trucking Co. motor truck to drive several blocks."

These are the overt acts that are charged here, and as I said before, you must find one of these.

"Ten: On or about 21 February, Samuel Eason, Carlton Boyd, Leon Rogers and James Dixon placed the truck driver in the back seat of the automobile driven by Leon Rogers.

"Eleven: On or about 21 February, Leon Rogers with James Dixon as a passenger, drove around New York with the truck driver in the back seat.

"Twelve: On or about 21 February, Carlton Boyd drove the Modern Trucking Co. motor truck with Samuel Eason, from downtown Manhattan to Long Island.

"Thirteen: On or about 21 February, Chester Crawford drove an automobile from Manhattan to Long

Island.

"Fourteen: On or about 21 February, Chester Crawford had a telephone call with Paul Viruet.

"Fifteen: On or about 21 February, Chester Crawford had a telephone conversation with Frank Cerell, Jr.

"Sixteen: On or about 21 February, Frank Cerell, Jr. and Paul Viruet traveled in an automobile on Long Island.

"Seventeen: On or about 21 February, Paul Viruet, Samuel Eason, Carlton Boyd and Chester Crawford unloaded the Modern Trucking Co. motor truck at Frank Cerell's home on Long Island."

Those are the overt acts that are charged and as I have said under the fourth element of the conspiracy, you must find that one of the conspirators knowingly committed at least one of the overt acts set forth in the indictment at or about the time and place alleged.

It is not necessary, following up what I have just said, that the government must prove that each member of the conspiracy committed or participated in an overt act; since as I have told you before, the act of any member, done in furtherance of the conspiracy, becomes the act of all the other members. The overt act

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2 need not have occurred at the precise times and the
3 precise places as alleged.

4 So too, while the indictment charges that the
5 conspiracy began on or about October 15, 1971 and
6 continued up to October 10, 1975, it is not essential
7 that the government prove the conspiracy started or
8 ended on or about these specific dates. It is sufficient
9 if you find that, in fact, the conspiracy was formed
10 and existed for some substantial time within the period
11 set forth in the indictment, and that an overt act
12 committed in furtherance of its objective was done at
13 or about the time alleged.

14 I have not referred to much evidence on which
15 the parties rely. I want to firmly say that all evidence,
16 whether or not I referred to it, is important and should
17 be considered by you. I am referring to testimony. I
18 sought to state the substance of it with complete accuracy.
19 However, again I wish to say if I made any reference to
20 testimony which does not agree with your recollection,
21 you are to disregard my statement, for it is your recollec-
22 tion and yours alone that governs.

23 I also want to say that just because evidence
24 is uncontradicted in the record, you need not accept it
25 if you do not find it to be believable. You alone, as I

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2 have said before, are called upon to decide the fact issues.
3 How do you do this? Your determination, ladies and
4 gentlemen, on the issues of credibility, depends on the
5 impression, very largely, that a witness or witnesses
6 made upon you. Was that witness telling the truth, or
7 giving you an accurate version of what happened?

8 As I said, when you walk in the door of this
9 courtroom and sit in the jury box while the trial is
10 going on, and while you are deliberating, you keep
11 your common sense and your good judgment with you. You
12 decide whether a witness has told a truthful and straight-
13 forward story; whether the witness attempted to conceal
14 anything; whether he or she had a motive to testify
15 falsely; whether there is any reason a witness might color
16 his or her testimony.

17 The ultimate question for you to decide in
18 passing upon credibility is: Did the witness that you
19 are considering, tell the truth here before you as to
20 essential matters? It is for you to say whether a witness
21 is truthful in whole or in part, in light of his or her
22 demeanor and all the evidence in the case. If you find
23 that any witness--and this applies to all the witnesses--
24 if you find that any witness has wilfully testified
25 falsely as to any material matter, you may reject the

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2 entire testimony of that witness, or you may accept such
3 part as commends itself to your belief or which you may
4 find is corroborated by other evidence in the case.

5 The government called Mr. Crawford and Mr.
6 Boyd and Mr. Dixon to testify. Defendant Viruet called
7 Samuel Eason to testify. These are men who claim that
8 they conspired with the defendants in this case. That a
9 witness asserts he is an accomplice, may be considered
10 by you as bearing upon his credibility and upon his
11 believability. However, it does not follow that just
12 because a person asserts participation in a crime, that
13 he is not capable of giving a truthful version of what
14 occurred. Such testimony, however, should be viewed with
15 great caution and scrutinized carefully. Did any alleged
16 co-conspirator here give false testimony or color
17 testimony contrary to fact, hopeful that this testimony
18 would result in favorable treatment some time, or did
19 these witnesses or any of them make a clean breast of
20 their wrongdoing and tell the truth as to significant
21 matters? That is your question.

22 Further, I want to say, there is no requirement
23 in the federal court that the testimony of an accomplice
24 be corroborated. A conviction may rest upon the uncor-
25 roborated testimony of an accomplice or accomplices if

1 you believe it, if you find it credible.

2 The fact that certain witnesses were government
3 employees, agents of the Federal Bureau of Investigation,
4 does not entitle their testimony to any greater weight
5 or consideration than that accorded to any other witness
6 in the case; nor does it entitle them to any less con-
7 sideration. You are to evaluate their credibility the
8 same way you would do that of any other witness.
9

10 The law permits but does not require a
11 defendant to take the stand in his own behalf. In this
12 case, both Mr. Cerell and Mr. Viruet have taken the
13 stand. Obviously each has a deep personal interest in
14 the result of this prosecution. Interest, as you are
15 doubtless aware, creates a motive for testifying falsely.
16 The greater the interest, the stronger the motive; and
17 the defendant's interest in the result of this trial is
18 of a character possessed by no other witness. In apprais-
19 ing the credibility of either Mr. Cerell or Mr. Viruet,
20 you should take such interest in the outcome into con-
21 sideration.

22 However, and I want to say this as firmly as
23 anything I have said before: It by no means follows,
24 that simply because a person has a vital interest in
25 the end result, that he is not capable of telling you a

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2 truthful, straightforward story. It is for you to decide
3 to what extent, if at all, his interest has colored
4 or affected his testimony.

5 Defendant Viruet has introduced evidence of
6 his good reputation in his community for honesty and
7 veracity. Assuming you credit this testimony, you may
8 properly consider whether a person with this character
9 would perpetrate the crimes charged in this indictment.
10 Therefore, you should consider this evidence in the case
11 in determining whether the prosecution has proved Mr.
12 Viruet guilty beyond a reasonable doubt. Evidence of
13 good reputation may in itself create a reasonable doubt
14 as to guilt where, without such evidence, no reasonable
15 doubt would exist.

16 On the other hand, if on all the evidence,
17 you are satisfied beyond a reasonable doubt that Mr. Viruet
18 is guilty, a showing that he previously enjoyed a repu-
19 tation of good character does not justify or excuse the
20 offense. You should not acquit him merely because you
21 believe he is a person of good repute. The testimony
22 of a character witness is a reflection of a reputation
23 in the community. The testimony of character reputation
24 is not to be taken by you as a witness' opinion as to
25 the guilt or innocence of the defendant on the charges

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2 in this indictment. The guilt or innocence of the
3 defendant is for you and you alone to determine.

4 You must consider -- I want to say this generally
5 -- you must consider each defendant separately as if he
6 alone were on trial, and you must consider each count
7 separately, and you shall return a separate verdict as to
8 each defendant and on each count.

9 If you fail to find -- fail to find beyond a
10 reasonable doubt that the law has been violated, you
11 should not hesitate for any reason, to return a verdict
12 of "acquittal"; but if, on the other hand, you should
13 find that the law has been violated as charged, you
14 should not hesitate, because of sympathy or other reason,
15 to render a verdict of "guilty" as a clear warning that
16 a crime of this character may not be committed with
17 impunity. The public is entitled to be assured of this.

18 I am getting close to the end.

19 The government, to prevail against either
20 defendant, must as I have said, prove each essential
21 element of each charge by the required degree of proof,
22 as I have charged you. If the government succeeds, your
23 verdict should be "guilty." If the government has failed,
24 your verdict must be "not guilty." Your verdict, ladies
25 and gentlemen, must be unanimous.

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Under your oath as jurors, you cannot and are not to allow any consideration of a sentence, which might be imposed on any defendant if convicted, to enter into your deliberations or influence your verdict in any way. Your duty is to decide the facts here, to decide this case solely and only upon the evidence before you. In the event of a conviction, the duty of imposing sentence rests solely with the Court.

Each of you, ladies and gentlemen, as a juror, is entitled to his or her own opinion; but each should, however, exchange views with your fellow-jurors. That is what jury deliberation means: to discuss and consider the evidence, to listen to the arguments of fellow-jurors, to present your individual views, to consult with one another, and to reach agreement based solely and wholly on the evidence, if you can do so without violation to your individual judgments.

Each must decide the case for himself or herself after a consideration and discussion with his or her fellow-jurors; but you should not hesitate to change an opinion which, after discussion with your fellows, appears erroneous. However, equally, if after careful consideration of all the evidence, the arguments of your fellow-jurors, you entertain a conscientious

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2 view that differs from others, you are not to yield your
3 conviction simply because you are outnumbered or out-
4 weighed.

5 Your final vote must reflect your conscientious
6 conviction as to how the issue should be decided. If
7 the government has failed to carry its burden, you should
8 acquit; that is your duty. If the government has
9 carried its burden, you must not flinch from your sworn
10 duty, but you must convict.

11 Ladies and gentlemen, that concludes my charge
12 on the law.

13 Gentlemen, do you have any matters you wish
14 to bring to my attention?

15 MR. REILLY: May we see you at the side bar?

16 THE COURT: We will go into the robing room.

17 MR. COHEN: May I approach the bench?

18 THE COURT: Yes, we are going in the robing
19 room.

20 (In the robing room.)

21 MR. COHEN: Judge, I thought I would like to
22 have you say something as to what credibility could the
23 jury take from the fact that anyone had a previous
24 record. In other words, whether or not they can give
25 him full credibility or whether or not, because of a

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2 previous conviction, they may give him less credibility,
3 something in that vein, because I didn't hear you say
4 anything about that, and I was waiting for you to say
5 something; because the law specifically says that, and
6 I think we should point out that they should evaluate
7 the credibility of a witness who has a prior record.

8 THE COURT: I don't know that there is any
9 such specific charge.

10 MR. REILLY: There is no requirement or even
11 recommended charge for that, your Honor. It was certainly
12 a matter of summation in great detail. I pointed that
13 out myself in my summation.

14 THE COURT: Yes, I understand your position,
15 but I decline to specifically point that out.

16 MR. EIBEL: Your Honor, I have no requests.

17 THE COURT: Mr. Reilly?

18 MR. REILLY: I note -- I may be wrong, but I
19 don't think your Honor did charge similar acts as a
20 pattern.

21 THE COURT: I did.

22 MR. REILLY: All right, then I withdraw it.

23 MR. COHEN: Yes.

24 THE COURT: I didn't charge it as a pattern; I
25 charged it as a course of conduct.

MR. EIBEL: Course of conduct.

MR. REILLY: All right. My only other comment was that Mr. Wolf of Fairy Tale and Mr. Crowe of the FBI were not mentioned, but I don't think it warrants any special issue.

MR. EIBEL: At one time, your Honor said -- I think you were referring to -- may have been looking at the old indictment, 1971; but it's unimportant, it was only mentioned once.

MR. COHEN: There was a superseding indictment and then -- you did mention '72 first, and then during the course of it --

MR. EIBEL: Just one time, you mentioned it as 1971. I don't think it's of significance.

THE COURT: If there is no problem with it, I certainly don't want to get into --

MR. EIBEL: There is not.

THE COURT: All right. I appreciate your calling that to my attention.

MR. REILLY: This is the re-redacted indictment.

THE COURT: Let's go outside.

(In open court; jury present.)

(The alternate juror was excused.)

THE COURT: The remaining 12 jurors may now

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2 retire to consider your verdict. The marshal will be
3 sworn and take charge of you.

4 (One United States marshal was duly sworn.)

5 (At 11:20 a.m., the jury retired to deliberate
6 upon a verdict.)

7 THE COURT: Gentlemen, I would suggest that you
8 put all of your exhibits in some place where, if that
9 is what is desired by the jury, they could be given to
10 the jury by the clerk, without the necessity of summoning
11 everybody including the reporter.

12 MR. EIBEL: Your Honor, I believe that Mr.
13 Reilly has all the exhibits that the defense put in as
14 defendant's exhibits. I think that includes the gas
15 receipts?

16 MR. REILLY: That's correct, I have them all.

17 MR. EIBEL: Mr. Reilly has them all.

18 THE COURT: May it be stipulated that if there
19 is a note calling for an exhibit, that that may be
20 turned over without the necessity of everybody convening
21 for that purpose?

22 MR. EIBEL: Yes.

23 MR. COHEN: I so stipulate.

24 MR. REILLY: The government so stipulates.

25 THE COURT: That will save quite a little bit

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2 of time.

3 (Recess.)

4 (In open court; jury not present.)

5 MR. REILLY: Mr. Cohen is here.

6 You have no objection to proceeding without
7 Mr. Cerell?

8 MR. COHEN: No, I don't have any objection
9 to my client's not being here.

10 THE COURT: We have a note here and, really,
11 it's counsel's job to respond to this. The problem is,
12 your client's apparently gone to lunch.

13 MR. COHEN: No, one is here. The other one
14 just went down to get some containers of coffee; but
15 your Honor, I feel that if this is just a rereading of
16 the testimony and if I can waive their appearance --

17 THE COURT: It has not anything to do with
18 testimony. It has to do with exhibits, with the dates
19 that things happened.

20 (Note from jury marked Court Exhibit 1.)

21 MR. REILLY: Your Honor, with respect to
22 Crawford's arrest, he testified to the best of his
23 recollection when he was arrested.

24 THE COURT: Can you all agree on when that is?

25 MR. EIBEL: My recollection is April of '73.

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2 MR. REILLY: He said April or May of '73; and
3 on questioning, he said he thought it was April. He
4 didn't remember whether it was April or May. I don't know
5 that it's particularly relevant but --

6 MR. COHEN: I don't remember May. He did say
7 April of 1973 that he was arrested.

8 THE COURT: If you have any problems, we'll
9 have to go through the stenographer's notes and pull it
10 out.

11 MR. REILLY: Then the date of Crawford's
12 statement on the FBI we can determine. It was in evidence
13 and it was in the 3500 material, something like that
14 November. We will look at it.

15 MR. COHEN: November there was an arrest of the
16 defendant.

17 MR. REILLY: That is '74. This is '73.

18 THE COURT: That statement was used as an
19 exhibit when he was examined. It may be marked for
20 identification. I know somebody mentioned the date.

21 MR. EIBEL: If he did, there is no problem.

22 MR. REILLY: Then the date of the arrest of
23 the two defendants was November 4, 1974.

24 THE COURT: Can you work that up right now?

25 MR. REILLY: Yes, we can do that.

(Pause.)

THE COURT: If you gentlemen would answer those questions on a sheet of yellow paper, responsive to that note by question number, then I will hand that back to them; and also, we can give them the exhibits they ask for at the same time. The marshal will just deliver them.

(Recess.)

THE COURT: Mr. Reilly is getting certain material; but defense counsel are here, and with their consent, I am going to put the date of the indictment on Court's Exhibit 1. We put the answer to 4 and to 5 in ink on this. I am going to write in, "The answer to 3 is to be supplied as soon as it is obtained," and the marshal may now give Court's Exhibit 1 back to the jury together with the exhibits. Take them all in. We're going to give them the exhibits and the indictment.

(Recess.)

(In open court; jury not present.)

THE COURT: We have a new note:

"We find we also need the date of the statement in which Crawford first identified Cerell and Viruet as receivers of the stolen merchandise."

That is obviously on the statement also.

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2 MR. REILLY: That is the same date he identified
3 Frank and Viruet; that is December 17.

4 MR. EIBEL: That's correct.

5 THE COURT: December 17, 1973?

6 MR. REILLY: Right. That is the same answer.
7 Is that the same answer?

8 MR. EIBEL: This one should be --

9 MR. REILLY: Let's make sure that is the same.
10 Let's get the 3500.

11 (Note from jury marked Court Exhibit 2.)

12 MR. REILLY: The other answer is December 17,
13 1973 to the new question.

14 THE COURT: In answering Question 3 in Court's
15 Exhibit 1, which we will now mark Court's Exhibit 3,
16 what dates am I to put?

17 MR. EIBEL: October 17, 1972.

18 (Answer to Question 3 in Court's Exhibit 1
19 marked Court Exhibit 3.)

20 THE COURT: October 17, 1972.

21 MR. COHEN: The date of first arrest.

22 THE COURT: This says when Crawford was first
23 arrested.

24 MR. REILLY: October 19, 1972 and October 22
25 or 23, 1972.

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2 THE COURT: All right, so I will have Court's
3 Exhibits 2 and 3 that you gentlemen can look at at this
4 point. I will have those returned to the jury by the
5 marshal.

6 (Recess.)

7 (At 4:45 p.m., in open court; jury not present.)

8 THE COURT: I'd like to hear a little argument
9 on this, Mr. Reilly, the case called to my attention.
10 My clerk and I were talking about this -- it seemed to
11 me that if this was a conspiracy of five men to steal
12 and fence merchandise from a truck, period; suppose they
13 sat around in the apartment and said, "We're going to
14 knock off a truck and sell it." Is that a federal crime?

15 MR. REILLY: That is a federal crime if that
16 truck was moving in interstate commerce, even if they
17 did not know.

18 THE COURT: But if they don't have a specified
19 truck, that is my problem. Suppose that --

20 MR. REILLY: If they did not have a specific
21 truck in mind, then it may -- if it was just a general
22 truck, perhaps that would be -- there would be a problem,
23 but that is not the case here.

24 THE COURT: That is why I get back to the fact
25 that this jury has not to conclude that Crawford had in

mind knocking off a truck that he knew to be moving in interstate commerce.

MR. REILLY: That is a totally different question.

THE COURT: That is not what they asked me. That is what I charged them in the beginning.

MR. REILLY: I understand you charged it, but under the Feola case, that is no longer required. This distinction between --

THE COURT: You just agreed with me. You just agreed with me and said that if they had a conspiracy to knock off any old truck that they happened to find moving up Lafayette Street --

MR. REILLY: Yes.

THE COURT: -- that conspiracy is not a federal conspiracy.

MR. REILLY: I disagree, your Honor; no.

THE COURT: What?

MR. REILLY: If that particular truck that they chose was --

THE COURT: They hadn't chosen a truck.

MR. REILLY: But they have chosen a truck in this case, your Honor.

THE COURT: I know, and that is why I say, you

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2 have got to bring in the fact that they had, in fact,
3 chosen a truck and --

4 MR. REILLY: They had chosen a truck; but even
5 if Crawford didn't know it was going to Jersey, but had
6 just chosen that truck and told the others, "I have
7 picked out the truck. I am going to highjack it," and
8 Crawford didn't know it was going to Jersey, he didn't
9 know where it was going, he just knew it was going out
10 of the terminal on that particular day; but if, in fact,
11 that truck was going to New Jersey, then it would be a
12 federal crime. If, in fact, however, that truck was only
13 going to The Bronx, it would only be a state crime. And
14 Crawford's knowledge of whether it was a --

15 THE COURT: I see what you are saying. All
16 right. What you want me to charge, in effect, is that
17 they had selected a truck which, in fact, was going to
18 New Jersey.

19 MR. REILLY: A specific shipment. That is
20 sufficient.

21 THE COURT: That is what you are saying this
22 Feola case holds?

23 MR. REILLY: That is correct, your Honor,
24 because the knowledge -- the Feola case says in the very
25 last paragraph, that: "Where the substantive offense

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2 does not require actual knowledge, then in a conspiracy
3 case, that knowledge will also not be required to
4 establish federal jurisdiction."

5 THE COURT: I see. All right. I will hear
6 from you in opposition, because I think that probably is
7 what the Feola case says.

8 MR. COHEN: If your Honor please, at this time
9 I want the record to be noted that I am subscribing to
10 what Mr. Eibel is saying in connection therewith, so
11 that --

12 THE COURT: You haven't heard what he said yet.

13 MR. COHEN: Whatever it is, I am going to sub-
14 scribe to it.

15 THE COURT: Let's go quickly to this because
16 the jury has been waiting patiently for a half-hour for
17 this information.

18 MR. EIBEL: If your Honor pleases, the Feola
19 case, as I read it, refers to the statute that protects
20 the safety of a federal officer in the performance of
21 his duty, and the Feola case discusses the two-fold
22 purpose of the statute, not only to protect the officer,
23 but also to protect the proper administration of justice
24 or whatever it was. I am being very rough, because I
25 read it rapidly, but that's what it says. That isn't

1 the statute or the purpose of the statute here.

2 We have only a single purpose: to prevent
3 highjacking of interstate commerce. I see no analogy,
4 and I don't think that the Crimmins case overruled in
5 an interstate highjacking conspiracy.
6

7 THE COURT: I think Mr. Reilly is right. I
8 instructed apparently under old law. Frankly, I think
9 that under old law, if the jury were to credit Crawford,
10 jurisdiction is found because Crawford knew he had
11 picked out a truck going to New Jersey.

12 MR. REILLY: Yes, your Honor, but I have a
13 difficulty with that, and that is that under the old law
14 of conspiracy, each member of the conspiracy would have
15 to have known that it was a federal or interstate ship-
16 ment. Otherwise, there could be no meeting of the minds
17 on that critical element. Yet the fact that Crawford
18 might have known it, and three people thought they were
19 engaging in a state truck highjacking, would under
20 Crimmins, I think, be a defective conspiracy count with
21 respect to those other three individuals. For that
22 reason, I am pressing the point. I don't believe the
23 record establishes as well as I would like it to establish,
24 that Mr. Cerell knew that it was an interstate shipment.

25 THE COURT: All right.

1
2 MR. EIBEL: Your Honor, I'd like to note my
3 objection on the record to having a case which was submitted
4 on one theory, and in the midst of the deliberation of
5 the jury, changed, to submit a second theory which
6 knocks out a vital part of the case that was submitted to
7 the jury.

8 I think it most unfair and prejudicial to the
9 defendants.

10 THE COURT: Well, no, you had no knowledge of
11 what I was going to charge on the law until I charged it,
12 so there was no effect on your defense. Your defense
13 is based upon the indictment.

14 MR. EIBEL: Yes, there was, because the govern-
15 ment submitted requests to charge.

16 THE COURT: I didn't have to give the government's
17 requests to charge. I would charge what the law is as I
18 best knew it.

19 MR. EIBEL: I know, but if your Honor please,
20 the government did not except to your charge nor did the
21 defendant, and the case was submitted to the jury for
22 their consideration on the theory that it was an integral
23 part of the proof.

24 THE COURT: I appreciate that, Mr. Eibel, but
25 all I am saying is that the factual aspects of this case

1 were elicited by both sides prior to any definitive state-
2 ment by me on the law; and therefore, there was no
3 prejudice to your clients by what I might charge on the
4 law because you did not know what I was going to charge
5 on the law in this regard until after the proof was in
6 and after you had summed up.
7

8 MR. EIBEL: But your Honor had charged that
9 the conspirators or at least one of them, if I remember
10 correctly, had to know that the shipment was an inter-
11 state shipment or they could not find a conspiracy to
12 hijack an interstate shipment. That is what your Honor
13 charged. Now, that was based upon the proof that was
14 submitted and the --

15 THE COURT: Well --

16 MR. EIBEL: May I finish, your Honor, please?
17 I will be very brief.

18 That was submitted without objection by the
19 other party, and I say now that to tell them after they
20 have been in the midst of their deliberation for a
21 number of hours, that they do not for the first time
22 have to find an interstate character known to one of the
23 conspirators in order to find the conspiracy, I think is
24 highly prejudicial and erroneous.

25 That is the point that I am basing it on the

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2 record.

3 MR. COHEN: May I join now, may I join in with
4 the objection? If your Honor is going to rule anything
5 to the contrary, I want to take exception.

6 THE COURT: Very good, you may have an
7 exception.

8 MR. EIBEL: I repeat my point just very briefly:
9 that I don't think the Crimmins case is overruled
10 because the analogy between the Feola case and the
11 Crimmins case is not a proper one, since the statutes
12 involved, the substance of the statutes involved are
13 totally different, and the purposes of the statutes are
14 different, and the conspiracy with respect to the sub-
15 stantive offenses are not the same, as is pointed out
16 in the majority opinion.

17 THE COURT: All right. Let's get the jury in.

18 MR. REILLY: Your Honor --

19 THE COURT: You have picked out the places?

20 MR. REILLY: There is a difficulty. I am told
21 by the reporter that Mr. Eibel and Mr. Cohen differ
22 concerning what I have selected and what they think
23 should be selected.

24 THE COURT: Have you selected other places?

25 MR. REILLY: No, they said what I have selected

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2 should not be heard.

3 MR. COHEN: We all started in the same place
4 but we feel it should be terminated at a certain point,
5 and Mr. Reilly feels that the additional conversation
6 should continue.

7 THE COURT: What is the additional conversation
8 that is subject to dispute? Maybe if it's very short, it
9 can be read to me and I can make a ruling.

10 MR. COHEN: I think if we can start in, we can
11 show you exactly where we think it should stop.

12 THE COURT: Let's do that.

13 (Portions of record read.)

14 THE COURT: This question No. 1 on Court's
15 Exhibit 4, asks for conversations with the defendants,
16 phone calls and conversations with the defendants regard-
17 ing the planning of the highjacking.

18 The only calls or conversations with the
19 defendants had not to do with anything other than the
20 disposition of the goods, as I remember it. Is there
21 any proof, any testimony they ever talked about how they
22 were going to get the truck or anything like that?

23 MR. REILLY: Well, your Honor it's the
24 government's theory in this case --

25 THE COURT: I am trying to make sense out of

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2 what the jury has asked for, and the thrust of these
3 questions was: the jury heard some testimony of conversa-
4 tions having to do with this overall highjacking between
5 Crawford and the defendants, and those conversations
6 really only had to do with getting rid of the load, isn't
7 that right?

8 MR. EIBEL: Yes.

9 MR. REILLY: Those obviously are the conversations
10 which the jury has in mind, because those are the only
11 conversations that the government brought out in its
12 direct case, concerning conversations before the actual
13 highjacking.

14 THE COURT: That's what they ask, "Direct
15 testimony in relation to the phone calls and conversations
16 with the defendants regarding the planning of the high-
17 jacking."

18 MR. COHEN: There is the conversation, and I
19 don't think you got to it: "Did you ever have a conversa-
20 tion about highjacking a truck with either Cerell or
21 Viruet?" And the answer was "Yes." That was the plan-
22 ning. This already goes into the second count. If they
23 want planning, that's different.

24 MR. EIBEN: There was a conversation before
25 this, between Crawford and the other three, not Viruet

1 mblm 356

2 and Cerell, with regard to highjacking the truck around
3 Christmas of '72. Then the testimony goes forward: "Did
4 you have a discussion with these defendants about getting
5 rid of -- about taking care of the load?" And that is
6 where it goes on.

7 THE COURT: Well, I disagree with that. I am
8 going to have this read to the jury, and I will ask them
9 if this is what they had in mind or if they had something
10 else in mind.

11 Let me ask you this, Mr. Reilly. I was giving,
12 in effect, the charge that you gave me on this question
13 of "intent"; what they had to know about the interstate --
14 what their intentions were as to an interstate shipment.
15 Now, in asking me to now give --

16 MR. REILLY: I don't think so, your Honor. I
17 was quite surprised by your charge, but I thought and
18 recollected that I had forgotten the Crimmins case, in
19 bringing that to your attention.

20 MR. EIBEL: Your Honor, I am not going to object
21 in the presence of the jury. The objection is the one
22 I made.

23 THE COURT: Am I creating any problems by
24 changing the thrust of my instructions at this time,
25 as defendants' counsel contend here?

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2 MR. REILLY: I do not believe so. The fact of
3 the matter is that if that is the applicable law, it is
4 the Court's obligation to bring that applicable law to
5 the attention of the jury. Obviously, this has been a
6 source of some concern to them in their deliberations,
7 and it's prolonged for that reason, and I do not believe
8 there is any prejudice -- obviously there is no prejudice
9 to the defendant. The only prejudice might be the lesser
10 standard of proof for the government to bear in obtaining
11 a conviction on the conspiracy count.

12 THE COURT: It's perfectly clear that nobody
13 was misled in terms of what trial evidence was obtained.
14 There is nothing to suggest that.

15 MR. EIBEL: The defendant's position is that
16 the applicable law is not as is stated by Mr. Reilly.
17 The applicable law, that's his interpretation; I have a
18 contrary interpretation.

19 THE COURT: We're past that.

20 MR. EIBEL: I understand that.

21 THE COURT: All right, let's get the jury,
22 please.

23 MR. COHEN: I, also, at this point, without the
24 jury being in, take objection and exception to that
25 portion of the testimony which I claim is not what the

2 jury wants to hear.

3 MR. EIBEL: In which I join.

4 (Jury present.)

5 (Note from jury marked Court Exhibit 4.)

6 THE COURT: Now, ladies and gentlemen, we have
7 your note, which I marked Court's Exhibit 4.

8 We are going to have certain direct testimony
9 of Chester Crawford read to you, which we believe
10 touches upon that area which you have asked for. All right?

11 Go ahead.

12 (Portions of direct testimony of Chester
13 Crawford read.)

14 THE COURT: All right.

15 Now, ladies and gentlemen, you have asked
16 me in Question 2, my charge regarding the interstate
17 aspect of conspiracy, if I can sum it up in a nutshell.
18 It has been called to my attention, since I charged you
19 this morning, that I may have been in error in details of
20 that charge, and to the extent that I have, I am giving
21 you now what I understand the law to be in that regard,
22 and this is the law that you are to apply. If there are
23 any problems in your understanding of it, please listen
24 very carefully to what I am about to say to you.

25 With regard to the interstate aspect of this

xxx

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2 conspiracy, it is sufficient -- I assume you have found
3 all the other elements beyond a reasonable doubt, but
4 if you have found all the other elements beyond a reason-
5 able doubt, it is sufficient to satisfy the interstate
6 commerce aspect of this conspiracy if you find beyond a
7 reasonable doubt that the truck the conspirators had in
8 mind to hijack was, in fact, one that would be moving
9 in interstate commerce.

10 It is not necessary that you find that a
11 defendant or either of them knew that the truck to be
12 hijacked would be moving in interstate commerce. It
13 is sufficient for you to find that the truck to be high-
14 jacked was, in fact, one that would be going in inter-
15 state commerce, regardless of what the defendants'
16 knowledge about the destination of that truck was.

17 Is that what you had in mind to ask me?

18 JUROR NO. 1: One second, please.

19 (At the side bar.)

20 THE COURT: Mr. Reilly, I believe I have
21 charged the Feola rule now, have I not? Have you any
22 problems with the Feola rule as I have given it to them?

23 MR. REILLY: No.

24 THE COURT: All right, because this is a
25 sensitive area and I am having to make a slight change in

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2 the charge, and you have listened to me carefully, I
3 take it, and this satisfies that requirement.

4 MR. REILLY: I have.

5 THE COURT: I think the jury, if they want to
6 put a question to me, should do it in writing at this
7 point, and why don't I give the juror a pad and pencil
8 and let him write down what it is and hand it to me
9 even as he sits here? Is there any objection to that?

10 MR. COHEN: As to what?

11 THE COURT: Apparently, Mr. Hoffman has a
12 question he wants to ask.

13 MR. EIBEL: In court? No objection, your
14 Honor.

15 THE COURT: I would like him to write it down
16 and hand it to me.

17 MR. COHEN: Yes.

18 THE COURT: Each of you counsel for the defense
19 have an exception to the charge?

20 MR. EIBEL: Yes.

21 THE COURT: All right.

22 (In open court.)

23 THE COURT: Mr. Hoffman, I am going to give
24 you a piece of paper and ask you to write down what it
25 is you want me to consider. You may sit right here and

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2 do it, but I would rather you put it in writing so that
3 counsel and we all know exactly what it is.

4 (Pause.)

5 (Note from jury marked Court Exhibit 5.)

6 THE COURT: Now, gentlemen, come to the side
7 bar so that you may have a look at this.

8 (At the side bar.)

9 THE COURT: The question from the jury is:

10 "What period of time should we consider in
11 deciding whether there was a conspiracy?"

12 I am going to charge them that while the
13 indictment charges the conspiracy began on or about
14 October 15, 1972, and continued thereafter up to October
15 10, 1975, it is not essential that the government prove
16 the conspiracy started or ended at specific dates. It is
17 sufficient that you find, in fact, a conspiracy was
18 formed and existed for some substantial time within the
19 period set forth in the indictment, and that the overt
20 act committed was done at or about the time alleged.

21 (In open court.)

22 THE COURT: Now, ladies and gentlemen, your
23 question is:

24 "What period of time should we consider in
25 deciding whether there was a conspiracy?"

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2 The period that you should consider is the
3 period from October 15, 1972, which is the commencement
4 date named in the indictment, up to and including the
5 time of the filing of the indictment, which is October
6 10, 1975. In that connection, let me give you a little
7 bit of a charge that I gave you at that time:

8 While the indictment charges that the conspiracy
9 began on or about the 15th of October, 1972, and con-
10 tinued thereafter up to October 10, 1975, it is not
11 essential that the government prove the conspiracy
12 started or ended on or about these specific dates. It
13 is sufficient if you find that, in fact, a conspiracy was
14 formed and existed for some substantial time within the
15 period set forth in the indictment, and that an overt
16 act was committed in furtherance of this objective and
17 was done at or about the time alleged.

18 Does that respond to the question you put to me?

19 JUROR NO. 1: Yes, sir.

20 THE COURT: All right, you may retire and
21 continue your deliberations.

22 (At 5:10 p.m., the jury retired to continue
23 their deliberations.)

24 (Recess.)

25 (In open court: jury present.)

REQUEST NO. 30

Similar Acts - Intent [If Applicable]

You may consider, in determining whether a defendant acted with guilty knowledge or intent, the fact, if you find it true, that the defendant engaged in other transactions similar to those charged in the indictment.

Kaplan v. United States, 18 F.2d
939, 943 (C.A. 2d 1927);

United States v. Shurtloff, 43 F.2d
944, 947 (C.A. 2d 1930);

United States v. Leitner, 312 F.2d
107, 108 (2d Cir. 1963);

United States v. Deaton, 381 F.2d
114 (2d Cir. 1967);

United States v. Mazzochi, Docket
No. 3284 (April 7, 1970).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA	:	DEMAND FOR NOTICE
	:	OF INTENTION TO
-v-	:	<u>OFFER ALIBI DEFENSE</u>
LEON ROGERS et al.,	:	S75 Cr. 979 (RO)
Defendant.	:	

-----X

S I R S :

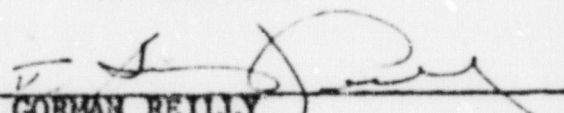
The Government by its attorney pursuant to Fed.R. Cr.P., 12.1(a) hereby demands that the defendant Paul Viruet and Frank Cerell, Jr. state whether it is their intention to offer a defense of alibi. The offense alleged in Count Three of the Indictment initially took place on February 21, 1973 approximately between 7:00 A.M. and 8:15 A.M. at 33 Belmont Avenue, PL view, New York.

If a defense of alibi is to be made defendant(s) shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he (they) intends to rely to establish such alibi.

Dated: New York, New York

December 10, 1975

THOMAS J. CAHILL
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

By: 
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